No. 10,095 4

In the United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Appellant,

-vs-

B. W. ALEXANDER, BECKWITH MERCANTILE COMPANY, a Montana Corporation, JOHN A. HAZEL, THEODORE KNUTSON and EDNA I. KNUTSON, his wife, P. W. SORENSEN, AVERY A. STEVENS, MEIL C. PIERCE, BERT LISH, BERT MYERS NELSON, JOHN ELLIS, J. A. McKEEVER, AXEL ERICKSON, JOHN MINESINGER and ADA B. MINESINGER, his wife, and THOMAS WALD,

Appellees,

and

FLATHEAD IRRIGATION DISTRICT, a corporation, and DENNIS A. DELLWO,

Appellants,

-vs-

B. W. ALEXANDER et al,

Appellees.

Brief of Appellants, Flathead Irrigation District, and Dennis A. Dellwo.

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POPE & SMITH
WALTER L. POPE
RUSSELL E. SMITH
Attorneys for said Appellants, Flathead Irrigation District and Dellwo.

MISSOULIAN

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STATEMENT OF JURISDICTION

This is an action commenced by the United States as plaintiff seeking to enjoin (Complaint R. 3 and 21-22) the defendants users of water from a system of private ditches on the Flathead Indian Reservation, from diverting excessive amounts of water from Post Creek and to enjoin the defendants from taking any water in the absence of measuring devices as required by an order of the Secretary of the Interior. The interveners, the Flathead Irrigation District and Dennis A. Dellwo, a water user within the district (Complaint in Intervention, Par. I, R. 52 & 53), admitted by Answer of United States, Par. I, R. 52, and in part by Answer of Defendants, Par. I, R. 89, and proved as to remainder, Ex. 16, R. 363), filed a complaint in intervention after an order allowing intervention (R. 51-52), seeking similar injunctive relief against the defendants. Judgment was entered dismissing the complaint and the complaint in intervention without prejudice. (R. 192). This appeal is from that judgment.

The statutory provision sustaining the jurisdiction of the District Court is Section 24, Judicial Code as amended, 28 U. S. C. A. Sec. 41, which provides that the District Court shall have jurisdiction of all suits of a civil nature in equity brought by the United States. The jurisdiction of the District Court to entertain the complaint in intervention is found in Rule 24, Federal Rules of Civil Procedure.

The statutory provision sustaining the jurisdiction of this court is Section 128, Judicial Code as amended, 28 U. S. C. A. Sec. 225, first paragraph, which provides that the Circuit Court of Appeals shall have jurisdiction to review by appeal final decisions of the district courts.

STATEMENT OF THE CASE

The Pleadings.

This is an action in injunction brought by the United States as the owner of the Flathead Irrigation Project. The complaint alleged that the defendants own lands on the Flathead Indian Reservation which are irrigated from private ditches and which have so-called private rights granted by the Secretary of the Interior for a portion of their lands. The complaint is drawn on the theory that the defendants were diverting more water through the private ditches than was permitted under the Secretary's order and should be enjoined, and that the defendants failed to provide measuring devices required by the regulations of the Secretary and should be enjoined from taking any water until they have installed such measuring devices. (R. 3).

The complaint in intervention alleges that the Flathead Irrigation District, which has a contract with the United States to purchase a portion of the Flathead Irrigation Project system, and Dennis A. Dellwo, a water user under the project system, are damaged by the acts of the defendants in taking more than their proper share of reservation waters. This complaint attacks the validity of the Secretary's order granting so-called private rights because it grants more than a pro rata share of the water and seeks to enjoin defendants from taking more than their pro rata share and from taking any water except as the same is distributed by the officers of the United States. (R. 52).

The answers of the defendants allege that each of the defendants is entitled to sufficient water to properly irrigate the lands of said defendants, that the Secretarial

rights are erroneous in limiting the water to be taken through the private ditches and that the defendants have prescriptive rights to the use of the waters of Post Creek. (R. 27 & 88).

The Facts.

Relation of Parties.

The United States, as trustee for the use of the Indians of the lands and waters of the Flathead Indian Reservation (created by Treaty of July 18, 1855, 12 Stat. 975, 2 Kappler 542), has constructed the Flathead Irrigation Project for the irrigation of Flathead Reservation lands at a cost of $8,112,649.29 (Ex. 18, R. 372). All of the lands of the defendants and the interveners are within the boundaries of the reservation. (Finding No. 90, R. 183).

There are two general classes of lands on the reservation: Those which pursuant to Acts of Congress were allotted to Indians in severalty, and those which were sold by the United States as surplus unallotted lands, the proceeds of which sales went to the Indian tribe. The latter lands are referred to as either surplus unallotted lands or farm units, and the former as lands originally allotted to Indians. (Act of Congress, April 23, 1904, 33 Stat. 302, and Act of Congress of May 29, 1908, 35 Stat. 448 Appendix).

A great majority of the lands on the reservation are irrigated from the Project System, some 54,000 acres in 1935 (R. 223), and the intervener Dellwo, a successor of an Indian allottee, (Findings 73-74, R. 173-174) is entirely dependent upon delivery from the project system for his irrigation. (R. 456, 457).

The defendants all take water from Post Creek, a reservation stream, through one of two ditches, i. e., the McDon-

ald-Deschamps ditch, or the Magee-Minesinger ditch. (Finding 66, R. 167, Finding 67, R. 167-168). Post Creek is one of the streams which supply water to the project system. The amount of water which the defendants take from Post Creek has a bearing on the amount of water available for the whole Mission Valley Division of the project, and for the intervenor Dellwo. (F. No. 74 and 75, R. 174, R. 235).

The Flathead Irrigation District was created under the laws of Montana providing for the creation of irrigation districts, has executed a repayment contract with the United States, and will upon final collection of the cost of construction of the system from the farmers who own lands in the district, become the owner of the Flathead Irrigation Project. The District likewise collects from its landowners the money which is paid to the United States for the operation and maintenance of the project. (Findings Nos. 76, 77, 78, R. 175; Ex. 15, R. 362).

The Defendants.

The defendants are all successors in interest of Indian allottees. All of them use water out of one of two private ditches known as the McDonald-Deschamps and the Magee-Minesinger ditches. These ditches were dug between 1905 and 1907. (Finding No. 71, R. 169, and Finding No. 72, R. 172). The following table shows the defendants, their Indian predecessors, the allotment number, the total irrigable acreage and the amount of land with a so-called "secretarial right." and the amount of that right.

Each of the defendants as indicated by the table has been granted a so-called secretarial right. These rights were

McDONALD-DESCHAMPS DITCH

Defendant	Indian Predecessor	Allotment No.	Ditch Dug	Total Irrig. Acreage (Ex. 10 & F. 63)	Secretarial Decree Rights (in acre feet Ex. 8)	Acreage Under Sec. Decree (Ex. 8)
B. W. Alexander	Duncan McDonald	561 (F. 71, R. 169)	May 1, 1905 (F. 71, R. 169)	35 (R. 313)	33.6 (R. 286)	16.8 (R. 286)
John Hazel Beckwith Merc. Co.	Florence McDonald	560 (F. 71, R. 170)	May 1, 1905 (F. 71, R. 169)	73 (R. 305)	16.4 (R. 287)	8.2 (R. 287)
Theodore and Edna I. Knutson	Mary C. McDonald	559 (F. 71, R. 170)	May 1, 1905 (F. 71, R. 169)	70 (R. 315)	6.4 (R. 288)	3.2 (R. 288)
P. W. Sorenson	Frank Fiddler	785 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	48 (R. 312)	36.6 (R. 285)	18.3 (R. 285)
Avery A. Stevens Meil C. Pierce (F. 42, R. 153)	Edward Deschamps	783 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	68.5 (R. 307)	20.6 (R. 281)	10.3 (R. 281)
Avery A. Stevens	William Deschamps	781 (F. 71, R. 171)	May 1, 1905 (F. 71, R. 169)	68 (R. 310)	22.2 (R. 284)	11.1 (R. 284)
Bert Lish Bert Myers Nelson John Ellis F. 45, R. 153)	Ora Deschamps	784 (F. 71, R. 172)	May 1, 1905 (F. 71, R. 169)	69.5 (R. 308)	28.2 (R. 283)	14.1 (R. 283)
J. A. McKeever	Caroline McKeever	791 (Comp. R. 14)		78 (R. 316)	2.8 (R. 289)	1.4 (R. 289)

MAGEE-MINESINGER DITCH

John and Ada B. Minesinger	John Minesinger	690 (F. 72, R. 172)	1907 (R. 172)	78 (R. 319)	150.8 (R. 291)	75.4 (R. 291)
Thomas Wald	James Waymack	689 (F. 72, R. 173)	1907 (R. 172)	78 (R. 323)	104.6 (R. 294)	52.3 (R. 294)
	Emma M. Magee	688 (F. 72, R. 173)	1907 (R. 172)	80 (R. 318)	160 (R. 290)	80.0 (R. 290)
Axel Erickson	Julia Minesinger	691 (F. 50, R. 156)	1907 (R. 172)	80 (R. 321)	154.8 (R. 293)	77.4 (R. 293)

granted by an order of the Secretary of the Interior who, after sending engineers into the field, determined the amount of land irrigated through the private ditches and the amount of water to which he found that land was entitled, and awarded the rights on that basis. (Findings 51 to 62, R. 156, 164). It is to be noted that the Secretary attempted to grant rights which were fixed in amount regardless of the quantities of water available. (Throughout the trial this order was referred to as the "Secretarial Decree," and that term will be used herein.)

As disclosed by the above table, the defendants were granted rights of 737 acre feet for 368.5 acres of land. Notwithstanding that the decree gave rights for but 368.5 acres, it is clear that most of the defendants are using water from their private ditches to irrigate much more land than was granted a secretarial right. The names of the defendants, the amount of land awarded a secretarial right, and the amount of lands irrigated from the private ditches are shown in the following table:

Name	Land With Secretarial Right	Land Now Irrigated from Private Ditch
B. W. Alexander	16.8 (R. 286)	40 (R. 534)
John Hazel (Beckwith Merc. Co.)	8.2 (R. 287)	30 to 40 (R. 538)
Theodore Knudson	3.2 (R. 288)	18 to 22 (R. 543)
P. W. Sorenson	18.3 (R. 285)	25.3 (R. 553)
*Avery Stevens	(11.1 (R. 284)	
Avery Stevens	(10.3 (R. 281)	110 (R. 556)
*Meil C. Pierce		38 to 40 (R. 565, 570)
Bert Myers Nelson	14.1 (R. 282)	12 (R. 572)
**Tom Wald	80 (R. 290)	
Tom Wald	52.3 (R. 294)	160 (R. 582)
	214.3	433.3

*Because the Ora Deschamps allotment was divided between Stevens and Pierce, it is difficult to determine the exact amount of the secretarial right owned by each, and hence the evidence is somewhat confused. Likewise it is difficult to determine here the amount of lands irrigated from the project system.

**Wald apparently irrigates 160 acres although the definite figure is not given in his testimony. In any event, he has not confined his use to the acreage awarded a secretarial right. (R. 594).

From this table it is seen that the defendants as to whom there is any evidence have expanded their use of the water from the 214.3 acres granted a right by the Secretary, to some 433.3 acres, and have used and claimed water for more than double the acreage which was granted a right by the Secretary.

There was no evidence offered as to the amounts used by each separate defendant, as there are no measuring devices on the ditches, but the answer of the defendants shows that they were each receiving one-half to one miner's inch per acre, which is equivalent to three to six acre feet per acre. (Ans. Pars. IV and VII, R. 35 to 40).

Water Diverted and Water Supply.

Exhibit No. 19 (R. 401), which is a table prepared by the United States engineers on the project, shows the amounts of water which are available under various circumstances and the amounts actually delivered in some cases. The table shows amounts in acre feet per acre. An acre foot of water is a quantity sufficient to cover an acre to a depth of one foot. (R. 379).

Horizontal Column No. 1 shows the amounts of water in acre feet which were actually diverted to the lands under the McDonald-Deschamps Ditch from 1935 to 1939. Thus sufficient water was diverted to the defendants owning lands under this ditch in 1935 to cover every irrigable acre to a depth of 3.61 feet. (R. 379-380). If diversion loss is considered this figure would have to be reduced 22% (R. 383), or to 2.81 feet, which was the amount actually delivered. (R. 382-383).

Horizontal Column No. 2 shows the amount of water per

acre diverted to these lands if only the lands awarded rights under the Secretarial decree are counted. (R. 381).

Horizontal Columns Nos. 3 and 4 show the same figures for the Magee-Minesinger lands. (R. 383).

It appears from this table that the average diversion for the lands of the defendants over their entire irrigable acreage from 1935 through 1939 was:

McDonald-Deschamps 4.32;

Magee-Minesinger .....8.12.

Considering the diversion loss of 22 per cent on the McDonald-Deschamps ditch (R. 382-383) and an eight per cent gain on the Magee-Minesinger ditch (R. 386), there was actually received on these lands: McDonald-Deschamps, average 4.32 less 22%, or an average of 3.37 acre feet per irrigable acre, and, Magee-Minesinger 8.12 plus an 8% increment (R. 385-386), or 8.76 acre feet per irrigable acre.

Horizontal Column No. 5 shows the amount of water in acre feet per acre which was actually delivered to Dellwo during the same period. (R. 385). The average was 1.19.

Horizontal Column No. 6 represents the average delivery per irrigable acreage in the entire Mission Valley Division of the project during the same time. It is to be noted that in arriving at this figure only farms irrigated were included. In any given year many farms are abandoned or for some other reason are not cultivated, and the irrigable acreage of those farms was excluded in arriving at the figures given. (R. 387-389). This average was 1.14.

Column No. 7 is a calculated figure showing the amount of water which could have been delivered over the entire project if there had been no stored waters. (R. 389-395).

Column No. 8 represents the amounts which could have

been delivered to lands which were originally Indian allotments if no water had been delivered to the farm units. (R. 395-396).

Column No. 9 shows the amounts which could have been delivered to lands originally allotted to Indians if there were no storage facilities. (396-397).

It is to be noted that these various columns were prepared to show the amounts of water available under various theories as to who may be entitled to water and that the amounts of water actually used by the defendants are greater than the amounts available to them under any theory that the court might adopt.

It is to be further noted that all of the calculations in Exhibit 19 refer exclusively to the Mission Valley Division of the project. This division has a separate source of supply, and has no waters which could be used on other parts of the reservation. (Findings Nos. 87 to 97, R. 183-185, and R. 233, 234 and 219-223). The lands of the Intervener Dellwo and of all of the defendants are located in this division of the project (F. No. 90, R. 183), as is most of the land in the Flathead Irrigation District. (R. 236).

Stored, Pumped and Reclaimed Water.

The Flathead Irrigation Project has a reservoir system which makes available for project lands much water which otherwise would not be available. These reservoirs include the Tabor (R. 214), the Kicking Horse, the Ninepipe, the Crow Creek, the Pablo, the Mission, the McDonald (R. 216) and Flathead Lake, from which lake water is pumped. (R. 219). The storage system saves water which would otherwise be lost in the early spring run-off and makes it avail-

able for use in the summer when the real need arises. (R. 391-393). This storage system has a capacity of 98,000 acre feet. (R. 392).

The lands of the defendants which have secretarial rights are not in the irrigation project and hence pay none of the costs, the construction or maintenance and operation of the storage facilities. (R. 390 & 404). These considerations raise the question of whether the defendants are entitled to share in the stored waters.

A Just and Equal Distribution.

It will be contended that the law requires a just and equal distribution of the waters, and interveners will contend that the words "just and equal distribution" contemplate not only an equality in quantity of water, but an equality in cost as well. The facts which are pertinent in this connection are: There were over 54,000 acres of land, not counting lands with private rights, which were irrigated in 1935. Some of these lands such as those of the defendants are close to the supply, while others like those of Dellwo are far removed. (Ex. 1, certified as original, R. 210 and 235). All parties using water under the project system, regardless of their location on the reservation, pay alike for water (R. 403) and receive as nearly as possible equal amounts. (R. 405-406). Only through a central system which has information as to available amounts and the demand can a just and equal distribution be secured. (R. 404-411).

Defendants' Method of Use.

The decree of the Secretary provides that the Engineer of the Reclamation Project shall be appointed the Water

Commissioner for the Reservation and shall distribute the water, and that it is the duty of persons using water under the decree to have suitable headgates, and that in the absence thereof the water commissioner should distribute no water. (R. 270. Approved 301-303). The record further shows that Henry Gerharz, Project Engineer, was appointed water commissioner by the Secretary. (Ex. 11, R. 329).

Gerharz, in July, 1935, wrote the defendants advising them of the provisions of the decree. (R. 331 & Ex. 35, R. 578). The defendants have taken water completely on their own initiative and have actually, by the removal of dams, prevented the project employees from administering the water. (R. 452).

These unregulated diversions by the defendants cause a waste of the reservation's waters. Thus the witness Dexter, a watermaster on the project, testified that the water for Post Creek comes out of the McDonald Lake reservoir and that the defendants' ditches take their water out of the creek just below the reservoir. (R. 448-449). When the watermaster lets sufficient water out of the lake to satisfy the known demand and then the defendants, without the knowledge of the water-master, take water out of the stream, there is a shortage of water and the amounts available for the farmers below are not sufficient to constitute irrigating heads and the water is wasted. (R. 450-451). Likewise, when the defendants have finished using water and turn the water back into the canal system without advising the watermaster of their intention to do so, then there is more water in the canal than can be immediately used and it runs to waste. (R. 449-451) . In addition to the waste of water, these unregulated diversions cause a great

deal of administrative difficulty. (R. 449-451). The witness Mountjoy gave similar evidence. (R. 435-439). There was no dispute as to these facts.

The testimony of these witnesses in addition to indicating that the defendants' method of use causes a waste, specifically illustrates the necessity for a central irrigation system under a unified control.

Questions Presented.

Out of this state of facts three principal questions arise:

1. Under the decision in U. S. v. Powers, (CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330, does the court have jurisdiction to grant an injunction?
2. Do the defendants have any right to take their water regardless of amount, except as delivered by the Project Engineer?
3. What is the measure of defendants' rights to take water through the private ditches?

SPECIFICATION OF ERRORS

I.

The Court erred in dismissing the complaint in intervention (R. 193) for the reason that the court had jurisdiction of the subject-matter of the action and of the parties, and that the undisputed evidence showed that the defendants and each of them were diverting water in manner and quantity contrary to law.

II.

The Court erred in Conclusion of Law No. 4 (R. 188), wherein the Court concluded that the Act of May 29, 1908, Section 9, (35 Stat. 448-449) allocated to each parcel of irrigable land allotted to an Indian in severalty a right to

use water as may be required to irrigate such land, for the reason that the act quoted did not attempt to define the amount of water allotted to each Indian or his land, but was concerned solely with construction charges, and further the Act specifically allotted water only to lands "under the systems herein provided" (R. 138) and did not by its terms grant rights to lands not under the system.

III.

The Court erred in Conclusion of Law No. 8 (R. 188), wherein the Court impliedly concludes that the lands allotted to the Indians in severalty have a right to the use of all of the reservation waters prior to the right of the surplus unallotted lands to the use of any, for the reason that the Acts of Congress do not distinguish between the right of allotted and surplus unallotted lands to the use of water.

IV.

The Court erred in Conclusion of Law No. 9 (R. 189), for the reason that the court interprets the words "just and equal distribution" as they are used in Section 7 of the Act of 1887 (25 U.S.C.A. 381) to refer exclusively to amounts of water, whereas in fact the words "just and equal distribution" refers not only to amount but likewise to the physical fact of the transportation of water and the cost thereof, and that under said section the secretary did have a right to make rules to secure a just distribution and to require that all persons comply therewith and to deprive any person who failed to comply with such rules and regulations of water.

V.

The Court erred in Conclusion of Law No. 10, (R. 190) for the reason that the adoption by the Secretary of the In-

terior of plans for an irrigation system did, when construed with the Act of May 29, 1908, Section 9, (35 Stat. 448-449) indicate a purpose to exclude all land from participation in water except that under the systems of irrigation provided by the Acts of Congress.

VI.

The Court erred in Conclusion of Law No. 11, (R. 190) for the reason that the court has misstated the contention of the intervener, which is that the United States as Trustee after the treaty owned the lands and waters of the reservation; for the further reason that no person, Indian or white, did as a matter of law have a right to water without the consent of the United States; and for the further reason that Conclusion of Law No. 11 is contrary to Conclusion of Law No. 3, and for the further reason that the defendants, even though entitled to some water through private ditches, had no right to take it except as specified by the Acts of Congress and the rules of the Secretary of the Interior adopted pursuant thereto.

VII.

The Court erred in Conclusion of Law No. 12, (R. 190) for the reason that the treaty did not, and could not have reserved the waters of the reservation to the individual Indians because they did not even live on the said reservation at the time of the treaty, and the irrigable lands had not been ascertained, and for the further reason that Conclusion No. 12 conflicts with Conclusion No. 3.

VIII.

The Court erred in Findings of Fact Nos. 66 and 67, (R. 167) wherein it found that the defendants, by using the amounts of water therein specified, did not act wrongfully

or unlawfully; for the reason that the amounts of water used by the said defendants are greatly in excess of the amounts of water used or available under any theory of a just and equal distribution of water and specifically are in excess of the amounts received by other users during the same period in the Mission Valley Division, and for the further reason that all of said water was admittedly taken contrary to the regulations of the Secretary and in violation of said regulations.

IX.

The Court erred in Finding of Fact No. 70, (R. 169) for the reason that the use of water by the defendants did deprive other users of water needed by them, and for the reason that the finding is contrary to the evidence.

X.

The Court erred in Findings of Fact Nos. 71 (R. 169) and 72, (R. 172) wherein the Court found that the defendants were properly using water to irrigate their lands for the reasons set forth in Specification of Error No. VIII.

XI.

The Court erred in Finding of Fact No. 63, (R. 165) wherein it found (upon Ex. 10, R. 304) that the irrigable acreage of Allotment No. 783 is 78.3 acres, whereas in fact it is 68.5 acres (R. 307); that the irrigable acreage of Allotment No. 784 is 74.5 acres, whereas in fact it is 69.5 acres (R. 308); that the irrigable acreage of Allotment No. 689 is 79.6 acres, whereas in fact it is 78 acres. (R. 323).

XII.

In the alternative if the Court was correct in dismissing the complaint and the complaint in intervention for want of jurisdiction, the court erred in making any findings of fact

and conclusions of law other than Conclusion of Law No. 13, for the reason that if the court had no jurisdiction of the case it had no jurisdiction to make findings or conclusions other than those necessary to disclose want of jurisdiction.

XIII.

The Court erred in failing to find that the defendants and each of them diverted during each of the years 1935 to 1939, inclusive, more than their pro rata per acre share of the waters of Post Creek.

XIV.

The Court erred in failing to find that the defendants or any of them were not entitled to any of the stored, pumped or reclaimed waters of the reservation for lands with a secretarial right.

XV.

The Court erred in failing to find that the defendants had no right to take any water except as delivered to them by the Water Commissioner of the Flathead Irrigation Project.

XVI.

The Court erred in failing to find that to the extent that the Secretarial decree purports to grant rights fixed in time and amount, it is contrary to law and an abuse of the discretion of the Secretary of the Interior.

XVII.

The Court erred in failing to enjoin the defendants from diverting more than their pro rata per acre share of the waters of the reservation.

XVIII.

The Court erred in failing to find that the unregulated diversions of water by the defendants causes administra-

tive difficulties and a waste of water and damages the interveners.

XIX.

The Court erred in failing to find that the use of greater quantities of water by the defendants than they are entitled to causes damage to the interveners, and that such damage cannot be readily ascertained, and that the legal remedy of the interveners is inadequate because of the speculative nature of the damages and the necessity for a multiplicity of suits.

ARGUMENT

(For summary of argument see index)

As indicated, there are three problems involved in this appeal. The question of jurisdiction should logically be first discussed, but because of the fact that it hinges upon the question of the nature of the rights involved we shall consider the question of jurisdiction after we have discussed the remaining problems.

I. *The defendants have no right to take their water except as it is delivered by the project management.*

It is conceded that the defendants in this case have some rights to water (the exact nature of which will be later discussed), but it is contended that such water as they are entitled to must be delivered by the project engineer, and that the defendants have no right to take their water on their own initiative, and thereby create administrative difficulties and cause an actual waste of water.

In *U. S.* v. *McIntire,* (CAA 9, 1939), 101 F. (2d) 650, this court, in dismissing an action for injunction brought by certain users under a private ditch to prevent the project of-

ficials and others from preventing the plaintiff users from taking water out of Mud Creek, a stream on the Flathead Reservation, said:

> "If appellees had been arbitrarily deprived of their 'just and equal distribution' perhaps the administrative officers of the project would be compelled to make proper distribution. Here, however, appellees claim a right wholly separate and distinct from whatever allocation the Secretary of the Interior might make."

We believe that this decision clearly demonstrates the proposition that all rights to water on the Flathead Indian Reservation must stem from the United States and that no person is entitled to water except as delivered by the "administrative officers of the project."

If we start with the proposition that upon the execution of the treaty the United States became trustee of the lands and waters for the benefit of the Indians, and that one who seeks to establish title must trace it from the United States, as announced in the *McIntire* case and *Montana Power* v. *Eugenia Rochester,* (CCA 9), 127 F. 2d. 189, the legislation and administrative action of the Secretary of the Interior taken pursuant to it, compel the conclusion that defendants in taking water themselves acted unlawfully.

All of the legislation affecting the Flathead Reservation lands up to 1916 indicates the intention of Congress that water should be delivered to lands through the irrigation systems provided for by the respective acts, and in no other manner. (Section 19 of the Act of June 21, 1906, (34 Stat. 354) is a mere saving clause. U. S. v. McIntire, supra, 101 U. S. 650, 654.) Thus, the Act of Congress of May 29, 1908 (35 Stat. 448) provided that the entryman (a purchaser of surplus unallotted lands) should pay for a water right the

proportionate cost of the construction of the system; should before receiving a patent pay the charges apportioned against such tract; that no rights to water should permanently attach until all payments therefor are made; that all applicants for water under the systems constructed should pay annual charges for operation and maintenance; and then the act provides:

> *"The land irrigable under the system herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie."*

The act continues.

> "When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior."

It is to be noted that this act refers only to lands "irrigable under the systems herein provided." After several years, during which Congress took no action except to appropriate for the construction of irrigation systems, the Act of May 18, 1916 (39 Stat. 139) was enacted. It provided: for the assessment of construction charges against

the purchasers of lands allotted to Indians, that the Secretary of the Interior might announce charges for construction against each acre of land irrigable under the systems; for the assessment of construction charges generally, and then provided:

> *"That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land."*

The defendants in this case simply cannot point to any legislative enactment except as above quoted which in any manner grants to them as the owners of private ditches a right to take water. Under this language it was clearly the Congressional intent that the user by private ditch acquired no right except at the discretion of the Secretary.

The question then arises, what action, if any, did the Secretary take? The answer is found in the Secretarial decree which, after determining the acreage watered from private ditches, provided how the water should be taken, as follows (R. 300):

> "The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall

have authority to regulate the distribution of water among the various users under any particular ditch.

All persons using water under a decree of the Secretary of the Interior are required to have suitable headgates at the point wherein the ditch taps the stream and shall also, at some suitable place on the ditch and as near the head thereof as practicable, place and maintain a proper measuring box, weir, or other appliance for the measurement of the water flowing in said ditch. In case any person or persons shall fail to place or maintain a proper measuring appliance it shall be the duty of said water commissioner not to apportion or distribute any water through said ditch." (R. 300—See also R. 279-280).

On June 8, 1934, Henry Gerharz, then Project Engineer, was appointed Water Master in a letter from the Secretary of the Interior which, among other things, provided:

"The report of the Commission appointed for the purpose of determining old water rights on the Flathead Indian Reservation in Montana, which was approved by the Department on November 25, 1921, included the following provision:

> The Secretary of the Interior shall appoint the Engineer in charge of the Reclamation work on the Flathead Indian Reservation to act as Water Commissioner for the Flathead Indian Reservation, and it shall be the duty of said water commissioner to divide the water of the natural stream or streams among the several ditches taking water therefrom according to the prior right of each. Said water commissioner shall have authority to regulate the distribution of water among the various users under any particular ditch.

Pursuant thereto, the then Project Engineer, Mr. C. J. Moody, was specifically appointed under date of August 10, 1922 by the Department to act, as Water Commissioner on this reservation.

> As you state, the Commission itself was discontinued on August 7, 1929, but this did not discontinue the office of the Water Commissioner whose duties are to administer the approved findings of the Commission.
>
> In view of the fact that the Water Commissioner must effect the division of the waters of the reservation between private parties and also between them and the Government irrigation project, it is felt that the Project Engineer is in the best position to perform these duties. Your request to be relieved of the responsibilities in this connection is, therefore, denied and you are hereby specifically appointed as Water Commissioner to do the things contemplated by the Commission's report." (Ex. 11, R. 327).

The defendants have refused to accede to the jurisdiction of the Water Commissioner, and have broken out the dams constructed by him. (R. 452). The defendants likewise failed to put in the headgates and measuring devices required by the decree. (Finding No. 68, R. 168 as to McDonald-Deschamps defendants, and as to the others R. 331-332).

Since, therefore, the only legislation granting rights vests discretion in the Secretary of the Interior, since he has made the allowances provided for in the act, since those rules and regulations not only carry into effect the provisions of the Act but also promote the just and equal distribution of water, and since the defendants have diverted water in complete violation of the rules provided by the Secretary of the Interior, to the damage of the interveners, we submit that an injunction should issue.

II. *The correct measure of the defendants' rights to the use of the waters of the Flathead Reservation—a pro rata share of the waters, exclusive of stored waters.*

It is perhaps unnecessary for the court in this case to de-

termine the precise nature of the defendants' rights for the reason that whatever theory may be adopted by the court, the defendants have taken more water than they are entitled to and have taken it in a wrongful manner and should consequently be enjoined. However, if the court wishes to make the injunction specific the question must be decided.

There are perhaps six different theories under which defendants might claim water for their lands not included within the project. As we see it, those theories are as follows:

1. So much as is required, claimed upon the doctrine of prior appropriation.
2. The amount awarded by the Secretarial decree.
3. Their pro rata share on an irrigable acreage of farms irrigated basis, considering only Indian allotments and without deducting stored water.
4. Their pro rata share on an irrigable acreage of farms irrigated basis, considering only Indian allotments and deducting stored water.
5. Their pro rata share on an irrigable acreage of farms irrigated basis without deducting stored water.
6. Their pro rata share on an irrigable acreage of farms irrigated basis deducting stored water.

We shall discuss each of these theories separately and point out that Theory No. 6 is the basis upon which the defendants' rights should be determined.

Theory No. 1—Prior Appropriation

Since the pronouncement of this court in *U. S.* v. *McIntire,* (CCA 9, 1939), 101 Fed. (2d) 650, it is clear that the

doctrine of prior appropriation is not operative upon the Flathead Indian Reservation. In that case this court said:

> "Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A. Sec. 661, requires recognition of those rights. That statute, however, applies only to 'public' lands. Winters v. United States, 9 Cir., 143 F. 740, 747, affirmed 207 U. S. 564, 28 S. Ct. 207, 52 L. Ed. 340. Lands which are reserved are severed from the public domain. Leavenworth etc. R. R. Co. v. United States, 92 U. S. 733, 745, 23 L. Ed. 634; United States v. Minnesota, 270 U. S. 181, 206, 46 S. Ct. 298, 70 L. Ed. 539. The statute mentioned, therefore, does not, we think, apply here. Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, 'shall remain under the absolute jurisdiction and control of the Congress of the United States.' 25 Stat. 676, Sec. 4.
>
> "Appellees further rely on Sec. 19 of the Act of June 21, 1906, as indicating that Congress recognized that waters might be appropriated. We think it is clear that the section relied on granted nothing, but was in effect a savings clause. At the time of its enactment, Winters v. United States, supra, had not been finally decided, and the question as to whether waters for Indians had been reserved by the treaties was debatable. The purpose of the section was to save any valid rights, if the question was answered in the negative."

Consequently, the defendants in this case have no rights superior to those of others by reason of the early use of waters by the predecessors of these defendants. We may therefore dismiss Theory No. 1.

Theory No. 2—Secretary's Decree of a Fixed Amount.

The Secretary of the Interior purported to award to each of the defendants in this case a right to a definite amount of water for a definite area of land and fix a definite date of priority without regard to the effect that such an award might have on other reservation lands. (Ex. 8, R. 275, Finding No. 53, R. 157). In short, the Secretary attempted to adjudicate Post Creek on the basis of the doctrine of appropriation. While interveners, as pointed out in an earlier part of this brief, assert the full validity of the Secretary's acts in appointing a water commissioner for division and administration of the reservation waters, interveners contend that the Secretary was without this power to award a fixed, definite amount of water to these private ditch owners.

In the *McIntire case, supra,* this court decided that no rights by appropriation could be acquired. Consequently even the Federal courts were powerless to award rights on that basis. It necessarily follows that if no rights were acquired by appropriation the Secretary had no power under the guise of an adjudication to give validity to any purported rights in the absence of a law vesting such power in him. In all the legislative history of the Flathead Reservation there is no such power given.

Section 19 of the Act of June 21, 1906, (34 Stat. 354), which is the only act mentioning appropriation, was properly held in the language above quoted from *United States* v. *McIntire,* to be a mere saving clause and not operative to create rights. Believing that the interpretation of Section 19 of the 1906 Act is controlled by the *McIntire case,* we shall not further urge the matter here.

Certainly the Act of May 29, 1908 (35 Stat. 448) did not give the Secretary of the Interior power to make his adjudication. The whole purport of the 1908 Act is to provide a general system of irrigation for the entire reservation and to require that each piece of land allotted pay its share of the operation and maintenance costs. As a matter of fact the act of the Secretary in awarding these private rights is contrary to the entire theory of the 1908 Act. The secretarial rights were awarded in this case to lands near Post Creek. Obviously the cost of delivering water to these lands would be less than to those more distant from the source of supply. The 1908 Act provides for a pro rata distribution of the cost. The only power given to the Secretary by the Act in question is the power to make rules and regulations to carry the Act into effect, and his action in awarding rights to certain individuals at the expense of others is certainly not authorized by the law, but is actually contrary to the whole purpose of it.

Section 7 of the General Allotment Act of 1887 (24 Stat. 388, 25 U. S. C. A. 381) reads as follows:

> "That in cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservation; *and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor.*" (Italics supplied).

The power given to the Secretary in this Act is limited to the adoption of rules "to secure a just and equal distri-

bution'' among the Indians and the italicized portion of the act clearly prohibits any preferential treatment.

In the *Powers Case,* 305 U. S. 527, 59 S. Ct. 344, the Supreme Court very plainly denied to the Secretary power to provide for an injust and unequal distribution in this language:

> ''The Secretary of the Interior had authority (Act 1887) to prescribe rules and regulations deemed necessary to secure just and equal distribution of waters. It does not appear that he ever undertook so to do. Certainly he could not affirmatively authorize unjust and unequal distribution. The statute itself clearly indicates Congressional recognition of equal rights among resident Indians.''

In light of the above it is our position that the decree is void to the extent that it purports to award rights.

Reference to Exhibit 19 (R. 401) discloses that two acre feet per acre, the amount awarded by the Secretary, is more water than has been actually delivered to other users on the reservation. Thus from 1935 to 1939 Dellwo received an average of 1.19 acre feet per acre, while the general deliveries on the entire Mission Valley Division were 1.14 acre feet per acre, and in no year did Dellwo or the others receive two acre feet. If only Indian allotments are considered two acre feet is more than could have been delivered in 1937 (the possible deliveries in that year were 1.78 acre feet), and unless defendants are entitled to share in stored water for which they pay nothing, two acre feet is more than could have been delivered in any year. However, in any event a decree which fixes an arbitrary quantity of water provides an unjust and unequal distribution of water.

As pointed out in other portions of this brief, we believe

the Secretarial decree to be valid to the extent that it regulates the manner of use, for such portions of the decree carry out the Congressional intent, and it is only to the extent that the decree departs from the legislation that we deem it void.

Theories No. 3 and 4—Preference for Allotments

Theories 3 and 4 raise the question of whether under the law the lands allotted to the Indians in severalty are entitled to a preferential treatment.

Congress, by the Act of April 23, 1904 (33 Stat. 302), provided for the allotment of lands in the reservation to the Indians in severalty and at the same time provided for the sale of surplus unallotted lands. Under the 1904 Act the money received by the Secretary from the sale of the lands was to be used for the benefit of the Indians.

By the Act of April 30, 1908 (35 Stat. 83), Congress appropriated $50,000 for the survey of the allotted and unallotted lands and to commence the construction of an irrigation system. It is to be noted that in this Act Congress did not distinguish in any manner between the allotted and surplus unallotted lands.

In the Act of May 29, 1908 (35 Stat. 448), Congress first provided for the opening of the reservation and the payments to be made by the settlers thereon. The Act then provides:

> "Provided, however, That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as

fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each."

And then further provides:

"All applicants for water rights under the systems constructed in pursuance of this act shall be required to pay such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the waterright application and the entry subject to cancellation, with the forfeiture of all rights under this act as well as of any moneys already paid thereon."

Under this Act the settler was required to do three things in addition to paying for the land.

1. Pay for a water right.
2. Reclaim one-half of the irrigable land.
3. Pay operation and maintenance costs.

Later on the Act provides:

"*The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems.* The purchaser of any Indian allotment, purchased

> prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie."

It is in connection with this language that the difficulty arises. It is our contention that Congress by this language intended merely to provide that the allotted lands should have a water right without cost of construction and that it was not the Congressional intention to distinguish between the water right granted to the surplus unallotted land and that granted the allotted land insofar as the quantum of the right was concerned. At the time of the Act it was then planned to use the funds obtained from the sale of the unallotted lands to pay the cost of construction. (Section 14).

1. *The Act, reasonably interpreted, treats all lands alike.*

It is almost inconceivable that Congress should require the homesteader to—

1. Pay for the cost of an irrigation system his pro rata share on an irrigable acreage basis when there might be no water from it.
2. Reclaim one-half of his land in the hope that the allotments would not take all of the water.
3. Pay operation and maintenance charges based upon an irrigable acreage basis while others who received a greater amount of water should pay on exactly the same basis.

Further than this, by limiting the rights granted to "lands under the systems herein provided," Congress, if it

intended to determine the *quantity* of right by the language used, gave a preferential right to those Indians who received lands irrigable under the "system" and thereby *excluded those Indians whose lands were not under the systems, including portions of the lands of these defendants.* In this connection see Finding No. 98 (R. 185) to the effect that there is not sufficient water to meet the requirements of the lands originally allotted to Indians. If we are so strictly to apply the word "require," then we must strictly apply the words "irrigable under the systems," and Indians whose lands are not "irrigable under the systems" would likewise be eliminated until the other Indian lands have had their requirements.

The case of *U. S.* v. *Powers* (CAA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330, indicates that such an interpretation is to be avoided. There the Supreme Court said:

> "We can find nothing in the statutes after 1868 adequate to show Congressional intent to permit allottees to be denied participation in the use of waters essential to farming and home making. If possible, legislation subsequent to the Treaty must be interpreted in harmony with its plain purposes."

As a matter of law this court is not required to put a rigid interpretation upon the words "require" and "irrigable under the systems herein provided."

In *Insurance Co.* v. *Gridley,* 100 U. S. 614, 25 L. Ed. 746, the Supreme Court said:

> "A thing which is within the letter of the statute is not within the statute unless it be within the intention of its makers."

Again in *Holy Trinity Church* v. *U. S.,* 143 U. S. 457, 36

L. Ed. 226, 12 S. Ct. 511, the same court said:

> ". . . frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the *absurd results* which follow from giving such a broad meaning to the words, makes it unreasonable to conclude that the legislator intended to include the particular act." (Italics supplied).

In *Barrett* v. *Van Pelt,* 268 U. S. 85, 69 L. Ed. 857, 45 S. Ct. 437, the court said:

> "The intention of the law maker constitutes the law, Stewart v. Kohn, 11 Wall. 493, 504. See Smythe v. Fiske, 23 Wall 374, 380. Being satisfied of the legislative intention the court will not be prevented from giving that intention effect by too rigid adherence to the very word and letter of the statute. Oates v. National Bank, 100 U. S. 239, 244."

To the same general effect are numerous decisions of the Federal courts, among which are

> Fleischman Const. Co. v. U. S., 270 U. S. 349, 70 L. Ed. 624, 46 S. Ct. 284,
> Town of Clayton v. Colorado (CCA N. M. 1931) 51 F. (2) 977.
> Saginaw Broadcasting Co. v. Federal C. Com. (App. D. C. 1938), 96 F. (2d) 554,
> Marlen v. Cardillo (App. D. C. 1938), 95 F. (2d) 112.

It is clear that the purpose of the 1908 Act was to provide for the construction of an irrigation system. It is further clear that Congress was primarily interested in how the costs should be borne and was not trying to allocate the waters of the reservation. If Congress had intended to make such an allocation certainly some reference would have been made to the rights of the farm units and the rights of those allotted lands which were not under the sys-

tems. All that Congress intended was to grant the Indian a right to water from the system without payment of construction costs.

Certainly it would be absurd for Congress to require that the purchaser of a farm unit pay for his pro rata share of the construction of a project, the waters of which were to be denied him, and even more absurd to require the purchaser to reclaim one-half of his "irrigable land" if there was to be no irrigation of it because of a disposal of all of the water to other land.

2. *The legislative history of the enactment discloses the intent that all lands should be treated alike.*

These provisions of the Act of May 29, 1908, (35 Stat. 448) were enacted as a part of H. R. 21,735 of the 60th Congress, 1st. Session. They were inserted by amendment in the Senate when the bill reached that body (42 Congressional Record, Part 7, page 6594). As shown by a statement accompanying the conference report which accepted the amendment (42 Cong. Record, Part 7, p. 7050) the amendment was taken bodily from Senate Bill 3640 as the latter bill was amended by the House committee. That committee's report on S. 3640 (House Report No. 1189, 60th Congress, 1st. Sess.) which is included in its entirety in the appendix to this brief, page 69, supplied the language here in question and explained its purpose at some length. The purpose in mind was the setting up of a proper system for the apportionment of construction and operation costs, as between allotted lands and lands sold to settlers. Attention was called to the fact that by Section 14, as amended in this act, the tribal funds derived from the proceeds of

sales of surplus unallotted lands should be used for the construction of the system. Previous appropriations had been reimbursable to the United States from this fund. (See Act April 30, 1908, 35 Stat. p. 83). The effort of the committee to equalize all charges as between both classes of lands is disclosed by the following language of the report:

> "The provisions of the original act were found also to be insufficient to provide for the apportionment of the cost of the construction of the irrigation system to the various tracts of land and also to provide for the apportionment of the cost of operation and maintenance of the system after its completion. By the terms of this act the lands which may be allotted to the Indians will not be charged with any of the cost of the construction of the irrigation system, but their proportionate part of the cost of construction will be taken out of the general fund by the Secretary of the Interior. The lands to be sold to settlers will be charged with their proportionate cost of this irrigation system, and this will be payable in fifteen annual installments. Various other matters of detail respecting the water rights are covered by the bill.
>
> As the bill passed the Senate and came to the House it undertook to release the Indians from the payment of their proportionate share of the cost of operation and maintenance of the irrigation system. On the hearing of the bill before this committee it was developed that in all probability three-fourths of the irrigable lands would be allotted to Indians, and it was seen that in all probability the great burden of maintenance of this extensive irrigation system might be thus thrust upon a very few of the purchasers of land, and, such being the case, no prudent purchaser would feel like investing his money in the purchasable land when the cost of maintenance would be so unevenly adjusted as to throw the entire charge upon him, and in some cases the charge might be sufficient to cover the entire value

> of his land. The attention of the author of the bill, together with the Indian Office, was brought to this matter by your committee, and, after careful consideration of all the facts and circumstances, the five amendments proposed by your committee and submitted herewith were agreed upon. As a result of these amendments your committee is of the opinion, and this opinion is shared in by the Reclamation Service and by the Commissioner of Indian Affairs, as well as the author of the bill in the Senate, that the irrigation system can be carefully constructed, the cost thereof equitably adjusted, and the cost of maintenance and operation will be evenly distributed to the various owners of irrigable lands. The Flathead Reservation, where the irrigation system will be constructed, embraces an area of very fine land especially adapted by reason of soil and climatic conditions to the growth of small fruits and grain."

It is obvious that the committee in framing this report, and Congress in enacting the amendment here proposed, had no thought that the water rights were to be unequal; on the contrary, in attempting to equalize the charges Congress must have assumed that the rights were to be equal.

3. *The legislative and executive interpretations indicate that Congress did not intend that there was to be a distinction between farm units and allotted lands.*

In *First National Bank* v. *Missouri*, 263 U. S. 640, 68 L. Ed. 486, 44 S. C. 213, the Supreme Court said:

> "This interpretation of the statute by the legislative department and by the executive officers of the government would go far to remove any doubt as to its meaning if any existed."

All of the Acts of Congress, both before and after the Act of May 29, 1908 (35 Stat. 448), indicate a similarity in the treatment of allotted and surplus unallotted lands. By the Act of April 30, 1908 (35 Stat. 83) Congress appropri-

ated money for the "allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted lands to be disposed of under the Act of April twenty-third, nineteen hundred and four." Similar language is contained in the later appropriation acts.

Act of March 3, 1909 (35 Stat. 795).
Act of April 4, 1910 (36 Stat. 277).
Act of March 3, 1911 (36 Stat. 1066).
Act of August 24, 1912 (37 Stat. 526).
Act of June 30, 1913 (38 Stat. 90).
Act of August 1, 1914 (38 Stat. 593).

By the Act of May 18, 1916 (39 Stat. 139) Congress adopted the recommendation contained in the report of a commission appointed to investigate this irrigation project. (House Document No. 1215, 63d. Cong., 3rd. Session, House Documents Vol. 103, p. 33). The Commission recommended "that future appropriations for irrigation work on the projects on these three Indian Reservations be made by direct appropriation of any funds available in the treasury of the United States, and such funds be made reimbursable, and the repayment of the same to be held as a lien against the lands benefitted, both those held by allottees and entrymen, and not hypothecate the tribal funds."

Accordingly there was returned to the tribal funds all moneys theretofore expended for construction, and the owners of all lands, whether allotted or unallotted, were required to repay the United States their proper proportion of the construction charges in sixteen installments. These construction charges were to be charged to "the allottee, entryman, purchaser, or owner of such irrigable land." The act then went on to provide:

"The cost of constructing the irrigation systems to

irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land."

Clearly, Congress here considered that the rights of the allottee and of the entryman were the same.

If there were any doubt about the matter it is settled by the Act of May 11, 1926 (44 Stat. 464). That act provided that the landowners on the reservation should organize irrigation districts under the state law, and that the irrigation districts should agree to repay the costs of construction. The act then specifically provides:

"That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts."

It is clear from this act that Congress, while not ceding its jurisdiction over trust patent Indians, did contemplate that all of the reservation lands should be accorded the

"same rights and privileges." A contention that there is a difference between allotted and unallotted lands simply cannot stand in the face of this unequivocal declaration by Congress.

It is likewise the rule that—

> "The situation therefore calls for the application of the settled rule that the practical interpretation of an ambiguous or uncertain statute by the Executive Department charged with its administration is entitled to the highest respect, and, if acted upon for a number of years, will not be disturbed except for very cogent reasons. United States v. Moore, 95 U. S. 760, 763; Hastings and Dakota Railroad Co. v. Whitney, 132 U. S. 357, 366; United States v. Alabama Great Southern Railroad Co., 142 U. S. 615, 621; Kindred v. Union Pacific Railroad Co., 225 U. S. 582, 596."
>
> Logan v. Davis, 233 U. S. 613, 58 L. Ed. 1121, 34 S. Ct. 685.

In this case the project officials have recognized no distinction between allotted and surplus unallotted lands, but treat all landowners as nearly alike as possible. (R. 404). This administrative practice is entitled to great weight.

It may be argued that Exhibit 33 (R. 489) indicates a contrary administrative declaration. However, it is clear that at that date construction of the system had barely begun, the location of ditches, reservoirs and canals not ascertained, and future appropriations uncertain. Hence irrigable acreage was wholly undetermined, and so this statement did nothing more than to advise the prospective purchasers that the rate and extent of construction of the system was problematical and that it could not be foreseen just when or in what quantity the water would be delivered. The statement was just as true of the allotted lands. Cer-

tainly there is no declaration that the lands allotted to Indians were to receive more water than other lands.

Likewise the legend on the map, Exhibit 21 (R. 478) does nothing more than indicate that the construction would commence in areas where there were large percentages of allotted lands and does not indicate any distinction between the allotted and surplus unallotted lands so far as quantum of right is concerned.

We submit that to construe the Act of May 29, 1908 (35 Stat. 448) as giving preferential rights to Indian allotments is contrary to the whole purpose of the act; reaches an absurd result in light of the history and the general purpose of the Act and particularly in light of the duties placed on the purchasers of the surplus lands; is directly contrary to the administrative construction of the Act; and reaches a result which will destroy the investments of hundreds of purchasers of reservation lands.

Consequently we urge that neither of Theories No. 3 or 4 should be applied as the measure of the rights in this case.

Theories Nos. 5 and 6—A Pro Rata Share.

These theories raise the question of whether the defendants, whose lands with a Secretarial right pay no construction costs, should be entitled to share in stored water. (See Ex. 8, R. 280 and R. 390). As indicated in the Statement of facts the stored water is water which would not be available in the absence of the dams and pumping systems which save it. Certainly on the plainest principles of equity the defendants should not be entitled to water saved and stored at the expense of Dellwo and the other persons who have to pay the hundreds of thousands of dollars which made

the storage possible. Hence, we urge that Theory No. 6 which gives each irrigable acre of the defendants' lands exactly the same right as each other irrigable acre on the project, except that it does not give defendants a right to water which is saved at someone else's expense, is the theory which should be adopted. If it is adopted, then on the basis of the 1935 to 1939 supply, defendants would be entitled to .70 acre feet per acre instead of 3.37 acre feet which the McDonald-Deschamps defendants took, or the 8.76 acre feet which the Magee-Minesinger defendants took. (See p. 12 of this brief).

III. The Court Had Jurisdiction.

The District Court dismissed the complaint and the complaint in intervention because of a want of parties, apparently in reliance upon the case of *U. S.* v. *Powers* (CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 59 S. Ct. 344, 83 L. Ed. 330.

We believe that the court improperly construed that decision. The law as to joinder of parties is settled by the exhaustive opinion of this court in the case of *State of Washington* v. *U. S.,* (CCA 9, 1936), 87 F. (2d) 421, wherein the court stated three classes of parties: formal, necessary and indispensable. The court then outlined the method for determining whether or not an absent party is indispensable, as follows:

> "From these authorities it appears that the absent party must be interested in the controversy. After first determining that such party is interested in the controversy, the court must make a determination of the following questions applied to the particular case: (1) Is the interest of the absent party distinct and severable? (2) In the absence of such party, can the court

render justice between the parties before it? (3) Will the decree made, in the absence of such party, have no injurious effect on the interest of such absent party? (4) Will the final determination, in the absence of such party, be consistent with equity and good conscience?

If, after the court determines that an absent party is interested in the controversy, it finds that all of the four questions outlined above are answered in the affirmative with respect to the absent party's interest, then such absent party is a necessary party. However, if any one of the four questions is answered in the negative, then the absent party is indispensable."

Applying this test to the absent parties, here, viz., the other landowners on the reservation, what do we find? Are the absent parties interested in the controversy? The answer is that they are to the extent that the amount of water taken by defendants affects the amount available for them. Finding an interest we then proceed to the numbered questions.

(1) Is the interest of the absent party distinct and severable? The answer is yes. The lands of the absent parties are separate lands. There is no joint ownership of any kind. There are no legal relations of any kind between the defendants and the absent parties.

(2) In the absence of such parties, can the court render justice between the parties before it? The answer is yes. The court has all of the information which is necessary to determine whether the defendants have taken more water than they are entitled to take or have taken it contrary to the lawful method. By determining the defendants' rights and by preventing them from exceeding those rights, the court can do justice to the United States and to the inter-

veners and still allow defendants all the water to which they are entitled.

(3) Will the decree made in the absence of such party have no injurious effect on the interest of such absent party? The answer is yes. If the defendants are enjoined from taking any water or more water than they are entitled to the effect of the decree will be to make more water available for the absent parties.

(4) Will the final determination in the absence of such a party be consistent with equity and good conscience? The answer is yes. The absent parties stand to lose nothing and to gain something. The more water taken by the defendants, the more water wasted because of uncontrolled diversions, the less water for the absent persons. At present defendants are taking quantities of water to which they are not entitled under any theory.

The only way in which the landowners not parties to this suit can be affected by it, is by the determination of the rule of law which fixes the quantity of water rights on the reservation. Owners of Secretarial rights not present and owners of farm units and allotted lands will be affected by the rule of law established, but only insofar as the doctrine of *stare decisis* is operative. In every case the determination of a rule of law affects many people not before the court, because almost every case involves problems common to many classes of people. Thus the gold clause cases declared a rule which touches all of our lives and yet it was not necessary that we all be parties. Hence, there is no reason why any parties other than those now before the court need be joined.

Even if the absent parties are necessary parties, as that term is defined in *State of Washington* v. *United States*, supra, the court erred in dismissing the complaints because of their absence. As pointed out in the decision:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed *necessary or* proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may, in its discretion, proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Under the circumstances here all of the land owners on the reservation literally cannot be made defendants.

Here we have a large and extensive system of irrigation built by the government at large expense. It is a fair inference that substantially all of the water users conform to the government's rules limiting each user to his proportion of the water available each year. If a dozen or sixteen out of the thousands of users help themselves to excessive quantities, has the Government no relief against these few without naming as defendants the thousand or more others with whom it has neither difficulty nor dispute? Apparently, in the lower court's view, if the Government were to attempt such a feat, and if, while the list of a thousand or more defendants were being compiled and typed, one of these non-resisting defendants died leaving several heirs who were thus omitted as defendants, the whole proceeding must fail!

Furthermore the joinder of every landowner on the reservation would be completely useless. The right to the use of water on the Flathead is necessarily a right to a certain proportion of the water, whatever that proportion may be. In this, the right is totally different from the rights granted where the doctrine of appropriation applies, for there each party is assigned a definite quantity of water which he may take without regard to the available amount, so long as he respects the prior rights. If the water available must be distributed justly and equally over a given quantity of land, then in the nature of things there can be no general determination that any acre is entitled to any definite quantity of water. The amount of water available varies from year to year depending on the precipitation, and if in 1935 there are 200,000 acre feet available and in 1936 but 175,000 acre feet, it follows that the amount for each acre is less in 1936 than in 1935. If therefore plaintiff had joined all of the many hundreds of landowners on the reservation, all that the court could possibly do would be to fix the rule of law according to which the water should be distributed, and if the court attempted to assign a definite quantity to each landowner, the gods of the weather would simply set aside such assignment. Thus, between 1935 and 1939, the amount of water per acre available on the Mission Valley Division varied from a low of .96 acre feet in 1937 to a high of 1.27 acre feet in 1936. (Ex. 19, R. 401). For these reasons we urge that the superhuman task of making every landowner on the reservation a party is not only unnecessary but would be completely futile.

Thus we come to the case of *United States* v. *Powers*,

(CCA 9, 1938), 94 F. (2d) 783, 305 U. S. 527, 83 L. Ed. 330, 57 S. Ct. 344.

The District Court apparently fell into error here by failing to realize that there were two separate issues in the *Powers* case:

1. The complaint of the United States to enjoin the defendants from taking *any* water.
2. The cross-complaints of the defendants seeking a definite adjudication of a quantity of water.

This court held that the defendants, in diverting water, were not trespassers and that the United States was not entitled to an injunction. There was no evidence to show that defendants had diverted more than their share of the water and since they had some right, an injunction could not possibly issue.

The court *after* disposing of the question of the injunction then dismissed the judgment awarding a fixed quantity of water to defendants because such adjudication did clearly affect those not parties. If defendants were awarded one-half a miner's inch per acre (3 acre feet in an irrigation season of 120 days) and there was not that amount for other landowners, clearly those others were adversely affected. The court did not hold, and we submit would not have held, that an injunction could not issue if the United States had shown an unjust and unequal use by defendants.

The Supreme Court affirmed the decision of this court, denied the injunction, and said:

> "The petitioners have shown no right to the injunction asked. We do not consider the extent or precise nature of respondent's rights in the water. The present proceeding is not framed to that end." (305 U. S. 533).

It is to be noted that both this court and the Supreme Court did establish the rule of just and equal distribution notwithstanding the absence of all of the landowners on the Crow Reservation. Clearly the complaint of the United States was dismissed for failure to prove that the defendants were not entitled to any water and the dismissal for lack of parties related to defendants' attempt by cross-complaint to secure a specific quantity of water for their lands.

We therefore submit that,

(1). under the rules relating to parties, there is no jurisdictional lack of indispensable or necessary parties here,

(2). the joinder of additional parties would be a useless procedure, and

(3). the *Powers case* is not authority for dismissal in this case.

The decision of the court below is anomalous. While it dismissed the suit without prejudice for want of jurisdiction to proceed in the absence of additional parties, it nevertheless made extensive findings as to the rights of the parties. If the court was right as to its want of jurisdiction it was certainly in error in making such findings, as pointed out in Specification of Error No. XII.

CONCLUSION

We therefore respectfully urge that the court has jurisdiction; that it should declare that defendants are entitled to no more than their pro rata per acre share of the waters of the Mission Valley Division, after deducting stored water, to the same extent as all other users on the reservation; that defendants should be enjoined from taking more than

such share since they have taken, and intend to continue to take more water than they are entitled to under any theory; and that they should be enjoined from taking water except as it is delivered or measured to them by the project officers.

Respectfully submitted,

POPE & SMITH,
WALTER L. POPE,
RUSSELL E. SMITH,
First National Bank Building,
Missoula, Montana,
Attorneys for Appellants,
Dellwo and Flathead Irrigation District.

APPENDIX

(Much of the legislation here in question was enacted either by way of rider to appropriation bills or as a part of extensive acts relating to Indian Affairs. For that reason most of the legislative provisions quoted in this appendix are but portions of the acts from which they are taken. In each such case the quoted language is preceded and followed by stars.)

ACT OF APRIL 23, 1904.

AN ACT For the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be, and he is hereby, directed to immediately cause to be surveyed all of the Flathead Indian Reservation, situated within the State of Montana, the same being particularly described and set forth in article two of a certain treaty entered into by and between Isaac H. Stevens, governor and superintendent of Indian affairs for the Territory of Washington, on the part of the United States, and the chiefs, headmen, and delegates of the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille Indians, on the sixteenth day of July, eighteen hundred and fifty-five.

SEC. 2. That so soon as all of the lands embraced within said Flathead Indian Reservation shall have been surveyed, the Commissioner of Indian Affairs shall cause allotments of the same to be made to all persons having tribal rights with said confederated tribes of Flatheads, Kootenais, Upper Pend d'Oreille, and such other Indians and persons holding tribal relations as may rightfully belong on said Flathead Indian Reservation, including the Lower Pend d'Oreille or Kalispel Indians now on the reservation, under the provisions of the allotment laws of the United States.

SEC. 3. That upon the final completion of said allotments to said Indians, the President of the United States shall appoint a commission consisting of five persons to inspect,

appraise, and value all of the said lands that shall not have been allotted in severalty to said Indians, the said persons so constituting said commission to be as follows: Two of said commissioners so named by the President shall be two persons now holding tribal relations with said Indians—the same may be designated to the President by the chiefs and headmen of said confederated tribes of Indians, two of said commissioners shall be resident citizens of the State of Montana, and one of said commissioners shall be a United States special Indian agent or Indian inspector of the Interior Department.

SEC. 4. That within thirty days after their appointment said commission shall meet at some point within the boundaries of said Flathead Indian Reservation and organize by the election of one of their number as chairman. Said commission is hereby empowered to select a clerk at a salary not to exceed seven dollars per day.

SEC. 5. That said commissioners shall then proceed to personally inspect and classify and appraise, by the smallest legal subdivisions of forty acres each, all of the remaining lands embraced within said reservation. In making such classification and appraisement said lands shall be divided into the following classes: First, agriculture land of the first class; second, agriculture land of the second class; third, timber lands, the same to be lands more valuable for their timber than for any other purpose; fourth, mineral lands; and fifth, grazing lands.

SEC. 6. That said commission shall in their report of lands of the third class determine as nearly as possible the amount of standing saw timber on legal subdivisions thereof and fix a minimum price for the value thereof, and in determining the amount of merchantable timber growing thereon they shall be empowered to employ a timber cruiser, at a salary of not more than eight dollars per day while so actually employed, with such assistants as may be necessary, at a salary not to exceed six dollars per day while so actually employed. Mineral lands shall not be appraised as to value.

SEC. 7. That said commissioners, excepting said special agent and inspector of the Interior Department, shall be paid a salary of not to exceed ten dollars per day each while

actually employed in the inspection and classification of said lands; such inspection and classification to be fully completed within one year from date of the organization of said commission.

SEC. 8. That when said commission shall have completed the classification and appraisement of all of said lands and the same shall have been approved by the Secretary of the Interior, the land shall be disposed of under the general provisions of the homestead, mineral, and town-site laws of the United States, except such of said lands as shall have been classified as timber lands, and excepting sections sixteen and thirty-six of each township, which are hereby granted to the State of Montana for school purposes. And in case either of said sections or parts thereof is lost to the said State of Montana by reason of allotments thereof to any Indian or Indians now holding the same, or otherwise, the governor of said State, with the approval of the Secretary of the Interior, is hereby authorized, in the tract under consideration, to locate other lands not occupied, not exceeding two sections in any one township, and such selections shall be made prior to the opening of such lands to settlement: *Provided*, That the United States shall pay to said Indians for the lands in said sections sixteen and thirty-six, or the lands selected in lieu thereof, the sum of one dollar and twenty-five cents per acre.

SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided*, That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further*, That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall reside upon and cultivate the land entered in

good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, all rights in and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made.

SEC. 10. That only mineral entry may be made on such of said lands as said commission shall designate and classify as mineral under the general provisions of the mining laws of the United States, and mineral entry may also be made on any of said lands whether designated by said commission as mineral lands or otherwise, such classification by said commission being only prima facie evidence of the mineral or nonmineral character of the same: *Provided,* That no such mineral locations shall be permitted upon any lands allotted in severalty to an Indian.

SEC. 11. That all of said lands returned and classified by said commission as timber lands shall be sold and disposed of by the Secretary of the Interior under sealed bids to the highest bidder for cash or at public auction, as the Secretary of the Interior may determine, under such rules and regulations as he may prescribe.

SEC. 12. That the President may reserve and except from said lands not to exceed nine hundred and sixty acres for

Catholic mission schools, church, and hospital and such other eleemosynary institutions as may now be maintained by the Catholic Church on said reservation, which lands are hereby granted to those religious organizations of the Catholic Church now occupying the same, known as the Society of Jesus, the Sisters of Charity of Providence, and the Ursuline Nuns, the said lands to be granted in the following amounts, namely, to the Society of Jesus, six hundred and forty acres, to the Sisters of Charity of Providence, one hundred and sixty acres, and to the Ursuline Nuns, one hundred and sixty acres, such lands to be reserved and granted for the uses indicated only so long as the same are maintained and occupied by said organizations for the purposes indicated. The President is also authorized to reserve lands upon the same conditions and for similar purposes for any other missionary or religious societies that may make application therefor within one year after the passage of this act, in such quantity as he may deem proper. The President may also reserve such of said lands as may be convenient or necessary for the occupation and maintenance of any and all agency buildings, substations, mills, and other governmental institutions now in use on said reservation or which may be used or occupied by the Government of the United States.

Sec. 13. That all of said lands classified as agricultural lands of the first class and agricultural lands of the second class and grazing lands that shall be opened to settlement under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be soid and disposed of to the highest bidder for cash, under rules and regulations to be prescribed by the Secretary of the Interior, at not less than their appraised value, and in tracts not to exceed six hundred and forty acres to any one person.

Sec. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the lands, shall be expended or paid, as follows: One-half shall

be expended from time to time by the Secretary of the Interior as he may deem advisable for the benefit of the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the time that this act shall take effect, in the construction of irrigation ditches, the purchase of stock cattle, farming implements, or other necessary articles to aid the Indians in farming and stock raising, and in the education and civilization of said Indians, and the remaining half to be paid to the said Indians and such persons having tribal rights on the reservation, including the Lower Pend d'Oreille or Kalispel thereon at the date of the proclamation provided for in section nine hereof, or expended on their account, as they may elect.

SEC. 15. That there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, or so much thereof as may be necessary, to pay for the lands granted to the State of Montana and for lands reserved for agency, school, and mission purposes, as provided in sections eight and twelve of this act, at the rate of one dollar and twenty-five cents per acre; also the sum of seventy-five thousand dollars, or so much thereof as may be necessary, the same to be reimbursable out of the funds arising from the sale of said lands to enable the Secretary of the Interior to survey the lands of said reservation as provided in section one of this act.

SEC. 16. That nothing in this act contained shall in any manner bind the United States to purchase any portion of the land herein described, except sections sixteen and thirty-six, or the equivalent, in each township, and the reserved tracts mentioned in section twelve, or to dispose of said land except as provided herein, or to guarantee to find purchasers for said lands or any portion thereof, it being the intention of this act that the United States shall act as trustee for said Indians to dispose of said lands and to expend and pay over the proceeds received from the sale thereof only as received.

Approved, April 23, 1904. (33 Stat. L., p. 302.)

* * * * *

FROM ACT OF JUNE 21, 1906.

Flathead Reservation.

That the act of April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," as amended by section nine of the act of March third, nineteen hundred and five (Thirty-third Statutes at Large, page one thousand and forty-eight), be amended by adding the following sections:

* * * * *

"Sec. 19. That nothing in this act shall be construed to deprive any of said Indians, or said persons or corporations to whom the use of land is granted by the act, of the use of water appropriated and used by them for the necessary irrigation of their lands or for domestic use or any ditches, dams, flumes, reservoirs, constructed and used by them in the appropriation and use of said water.

Approved, June 21, 1906. (34 Stat. L., p. 354.)

FROM ACT OF APRIL 30, 1908

* * * * *

For preliminary surveys, plans, and estimates of irrigating systems to irrigate the allotted lands of the Indians of the Flathead Reservation in Montana and the unallotted irrigable lands to be disposed of under the act of April twenty-third, nineteen hundred and four, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana, and the sale and disposal of all surplus lands after allotment," and to begin the construction of the same, fifty thousand dollars, the cost of said entire work to be reimbursed from the proceeds of the sale of the lands within said reservation.

* * * * *

Approved, April 30, 1908. (35 Stat. L., p. 83.)

FROM ACT OF MAY 29, 1908.

* * * * *

SEC. 15. That section nine, chapter fourteen hundred and ninety-five, Statutes of the United States of America, entitled "An act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment," be, and the same is hereby, amended to read as follows:

"SEC. 9. That said lands shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the time when and the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof, and no person shall be permitted to settle upon, occupy, or enter any of said lands, except as prescribed in such proclamation: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late civil and the Spanish wars, as defined and prescribed in section twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *Provided further,* That the price of said lands shall be the appraised value thereof, as fixed by the said commission, but settlers under the homestead law who shall resides upon and cultivate the land entered in good faith for the period required by existing law shall pay one-third of the appraised value in cash at the time of entry, and the remainder in five equal annual installments, to be paid one, two, three, four, and five years, respectively, from and after the date of entry, and shall be entitled to a patent for the lands so entered upon the payment to the local land officers of said five annual payments, and in addition thereto the same fees and commissions at the time of commutation or final entry as now provided by law where the price of the land is one dollar and twenty-five cents per acre, and no other and further charge of any kind whatsoever shall be required of such settler to entitle him to a patent for the land covered by his entry: *Provided,* That if any entryman fails to make such payments, or any of them, within the time stated, all rights in

and to the land covered by his or her entry shall at once cease, and any payments theretofore made shall be forfeited, and the entry shall be forfeited and canceled: *And provided,* That nothing in this act shall prevent homestead settlers from commuting their entries under section twenty-three hundred and one, Revised Statutes, by paying for the land entered the price fixed by said commission, receiving credit for payments previously made: *Provided, however,* That the entryman or owner of any land irrigable by any system hereunder constructed under the provisions of section fourteen of this act shall, in addition to the payment required by section nine of said act, be required to pay for a water right the proportionate cost of the construction of said system in not more than fifteen annual installments, as fixed by the Secretary of the Interior, the same to be paid at the local land office, and the register and receiver shall be allowed the usual commissions on all moneys paid.

"The entryman of lands to be irrigated by said system shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay the charges apportioned against such tract. No right to the use of water shall be disposed of for a tract exceeding one hundred and sixty acres to any one person, and the Secretary of the Interior may limit the areas to be entered at not less than forty nor more than one hundred and sixty acres each.

"A failure to make any two payments when due shall render the entry and water-right application subject to cancellation, with the forfeiture of all rights under this act, as well as of any moneys paid thereon. The funds arising hereunder shall be paid into the Treasury of the United States and be added to the proceeds derived from the sale of the lands. No right to the use of water for lands in private ownership shall be sold to any landowner unless he be an actual bona fide resident on such land or occupant thereof residing in the neighborhood of such land, and no such right shall permanently attach until all payments therefor are made.

"All applicants for water rights under the systems constructed in pursuance of this act shall be required to pay

such annual charges for operation and maintenance as shall be fixed by the Secretary of the Interior, and the failure to pay such charges when due shall render the water-right application and the entry subject to cancellation, with the forfeiture of all rights under this act as well as of any moneys already paid thereon.

"The Secretary of the Interior is hereby authorized to fix the time for the beginning of such payments and to provide such rules and regulations in regard thereto as he may deem proper. Upon the cancellation of any entry or water-right application, as herein provided, such lands or water rights may be disposed of under the terms of this act and at such price and on such conditions as the Secretary of the Interior may determine, but not less than the cost originally fixed.

"The land irrigable under the systems herein provided, which has been allotted to Indians in severalty, shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment, purchased prior to the expiration of the trust period thereon, shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

"When the payments required by this act have been made for the major part of the unallotted lands irrigable under any system and subject to charges for such construction thereof, the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior.

"The Secretary of the Interior is hereby authorized to perform any and all acts to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this act into full force and effect."

That section fourteen of said act be, and the same is hereby, amended to read as follows:

"SEC. 14. That the proceeds received from the sale of said lands in conformity with this act shall be paid into the Treasury of the United States, and after deducting the expenses of the commission, of classification and sale of lands, and such other incidental expenses as shall have been necessarily incurred, and expenses of the survey of the land, shall be expended or paid, as follows: So much thereof as the Secretary of the Interior may deem advisable in the construction of irrigation systems, for the irrigation of the irrigable lands embraced within the limits of said reservation; one half of the money remaining after the construction of said irrigation systems to be expended by the Secretary of the Interior as he may deem advisable for the benefit of said Indians in the purchase of live stock, farming implements, or the necessary articles to aid said Indians in farming and stock raising and in the education and civilization of said Indians, and the remaining half of said money to be paid to said Indians and persons holding tribal rights on said reservation, semi-annually as the same shall become available, share and share alike: *Provided,* That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of irrigation system."

Approved, May 29, 1908. (35 Stat. L., p. 448.)

* * * * *

FROM ACT OF MAY 18, 1916.

* * * * *

PROVIDED further, That nothing contained in the Act of May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-four), shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, or to relieve the owners of any or all land allotted to Indians in severalty from payment of the charges herein required to be made against said land on account of construction of

the irrigation systems; and in carrying out the provisions of said section the exemption therein authorized from charges incurred against allotments purchased prior to the expiration of the trust period thereon shall be the amount of the charges or installments thereof due under public notice herein provided for up to the time of such purchase.

For continuing construction of the irrigation systems on the Fort Peck Indian Reservation, in Montana, $100,000 (reimbursable), which shall be immediately available: Provided, That the proportionate cost of the construction of said systems required of settlers and entrymen on the surplus unallotted irrigable land by section two of the Act of May thirtieth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page five hundred and fifty-eight), shall be paid as herein provided: Provided further, That nothing contained in said Act of May thirtieth, nineteen hundred and eight, shall be construed to exempt the purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon from any charge for construction of the irrigation system incurred up to the time of such purchase, except such charges as shall have accrued and become due in accordance with the public notices herein provided for, and the purchaser of any Indian allotment to be irrigated by said systems purchased upon approval of the Secretary of the Interior before the charges against said allotment herein authorized shall have been paid shall pay all charges remaining unpaid at the time of such purchase, and in all patents or deeds for such purchased allotments, and also in all patents in fee to allottees or their heirs issued before payment shall have been made of all such charges herein authorized to be made against their allotments, there shall be expressed that there is reserved upon the lands therein described a lien for such charges, and such lien may be enforced, or upon payment of the delinquent charges may be released by the Secretary of the Interior.

For continuing construction of the irrigation systems on the Blackfeet Indian Reservation, in Montana, $25,000 (reimbursable), which shall be immediately available: Provided, That the entryman upon the surplus unallotted lands to be irrigated by such systems shall, in addition to compliance with the homestead laws, before receiving patent for the

lands covered by his entry, pay the charges apportioned against such tract as herein authorized, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture to the United States of all rights acquired under the provisions of this act, as well as of any moneys paid on account thereof. The purchaser of any Indian allotment to be irrigated by such systems, purchased upon approval of the Secretary of the Interior, before the charges against said allotment herein authorized shall have been paid, shall pay all charges remaining unpaid at the time of such purchase and in all patents or deeds for such purchased allotments, and also in all patents in fee to allottees or their heirs issued before payment of all such charges herein authorized to be made against their allotments, there shall be expressed that there is reserved upon the lands therein described a lien for such charges, and such lien may be enforced, or, upon payment of the delinquent charges, may be released by the Secretary of the Interior.

The work to be done with the amounts herein appropriated for the completion of the Blackfeet, Flathead, and Fort Peck projects may be done by the Reclamation Service on plans and estimates furnished by that service and approved by the Commissioner of Indian Affairs: Provided, That not to exceed $15,000 of applicable appropriations made for the Flathead, Blackfeet, and Fort Peck irrigation projects shall be available for the maintenance, repair, and operation of motor-propelled and horse-drawn passenger-carrying vehicles for official use upon the aforesaid irrigation projects: Provided further, That not to exceed $7,500 may be used for the purchase of horse-drawn passenger-carrying vehicles, and that not to exceed $1,500 may be used for the purchase of motor-propelled passenger-carrying vehicles.

That the Secretary of the Interior be, and he is hereby, authorized and directed to announce, at such time as in his opinion seems proper, the charge for construction of irrigation systems on the Blackfeet, Flathead, and Fort Peck Indian Reservations in Montana, which shall be made against each acre of land irrigable by the systems on each of said reservations. Such charges shall be assessed against the

land irrigable by the systems on each said reservation in the proportion of the total construction cost which each acre of such land bears to the whole area of irrigable land thereunder.

On the first day of December after the announcement by the Secretary of the Interior of the construction charge the allottee, entryman, purchaser, or owner of such irrigable land which might have been furnished water for irrigation during the whole of the preceding irrigation season, from ditches actually constructed, shall pay to the superintendent of the reservation where the land is located, for deposit to the credit of the United States as a reimbursement of the appropriations made or to be made for construction of said irrigation systems, five per centum of the construction charge fixed for his land, as an initial installment, and shall pay the balance of the charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum of the construction charge. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: Provided, That any allottee, entryman, purchaser, or owner may, if he so elects, pay the whole or any part of the construction charges within any shorter period: Provided further, That the Secretary of the Interior may, in his discretion, grant such extension of the time for payments herein required from Indian allottees or their heirs as he may determine proper and necessary, so long as such land remains in Indian title.

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The cost of constructing the irrigation systems to irrigate allotted lands of the Indians on these reservations shall be reimbursed to the United States as hereinbefore provided, and no further reimbursements from the tribal funds shall be made on account of said irrigation works except that all charges against Indian allottees or their heirs herein authorized, unless otherwise paid, may be paid from the individual shares in the tribal funds, when the same is available for distribution, in the discretion of the Secretary of the Interior.

That in addition to the construction charges every allottee, entryman, purchaser, or owner shall pay to the superintendent of the reservation a maintenance and operation charge based upon the total cost of maintenance and operation of the systems on the several reservations, and the Secretary of the Interior is hereby authorized to fix such maintenance and operation charge upon such basis as shall be equitable to the owners of the irrigable land. Such charges when collected shall be available for expenditure in the maintenance and operation of the systems on the reservation where collected: Provided, That delivery of water to any tract of land may be refused on account of nonpayment of any charges herein authorized, and the same may, in the discretion of the Secretary of the Interior, be collected by a suit for money owed: Provided further, That the rights of the United States heretofore acquired, to water for Indian lands referred to in the foregoing provision, namely, the Blackfeet, Fort Peck, and Flathead Reservation land, shall be continued in full force and effect until the Indian title to such land is extinguished.

That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations and issue such notices as may be necessary to carry into effect the provisions of this Act, and he is hereby authorized and directed to determine the area of land on each reservation which may be irrigated from constructed ditches and to determine what allowance, if any, shall be made for ditches constructed by individuals for the diversion and distribution of a partial or total water supply for allotted or surplus unallotted land: Provided, That if water be available prior to the announcement of the charge herein authorized, the Secretary of the Interior may furnish water to land under the systems on the said reservations, making a reasonable charge therefor, and such charges when collected may be used for construction or maintenance of the systems through which such water shall have been furnished.

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Approved May 18, 1916 (39 Stat. 139).

FROM ACT OF MAY 11, 1926

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For continuing construction, maintenance, and operation of the irrigation systems on the Flathead Indian Reservation, in Montana, by and under the direction of the Commissioner of Indian Affairs, including the purchase of any necessary rights or property, $575,000: PROVIDED, That of the total amount herein appropriated not to exceed $15,-00 shall be available for operation and maintenance of the project, the balance to be available for the construction items hereinafter enumerated in not to exceed the following amounts: Pablo Feed Canal enlargement, $100,000; Moiese Canal enlargement, $15,000; South Side Jocko Canal, $40,-000; Hubbart Feed Canal, $7,500; Camas A Canal, $2,500; continuing construction of power plant, $395,000, of which sum $15,000 shall be immediately available for additional surveys and preparation of plans: PROVIDED FURTHER, That no part of this appropriation, except the $15,-000 herein made immediately available, shall be expended on construction work until an appropriate repayment contract, in form approved by the Secretary of the Interior, shall have been properly executed by a district or districts organized under State law embracing the lands irrigable under the project, except trust patent Indian lands, which contract, among other things, shall require repayment of all construction costs heretofore or hereafter incurred on behalf of such lands, with provision that the total construction cost on the Camas Division in excess of the amount it would be if based on the per acre construction cost of the Mission Valley Division of the project, shall be held and treated as a deferred obligation to be liquidated as hereinafter provided. Such contract shall require that the net revenues derived from the operation of the power plant herein appropriated for shall be used to reimburse the United States in the following order: First, to liquidate the cost of the power development; second, to liquidate payment of the deferred obligation on the Camas Division; third, to liquidate construction cost on an equal per acre basis on each acre of irrigable land within the entire project; and fourth, to liquidate operation and maintenance

costs within the entire project. Provision shall also be contained therein requiring payment of operation and maintenance charges annually in advance of each irrigation season and prohibit the granting of a water right to or the use of water by any individual for more than one hundred and sixty acres of land irrigable under constructed works within the project after the Secretary of the Interior shall have issued public notice in accordance with the Act of May 18, 1916 (Thirty-ninth Statutes at Large, pages 123-130); all lands, except lands owned by individual Indians, at the date of public notice in excess of one hundred and sixty acres not disposed of by bona fide sale within two years after said public notice shall be conveyed in fee to the United States free of encumbrance to again become a part of the publice domain under contract between the United States and the individual owners at the appraised price fixed at the instance of the Secretary of the Interior, such amount to be credited in reduction of the construction charge against the land within the project retained by such owner. All lands so conveyed to the United States shall be subject to disposition by the Secretary of the Interior in farm units at the appraised price, to which shall be added such amount as may be necessary to cover any accruals against the land and other costs arising from conditions and requirements prescribed by said Secretary: PROVIDED FURTHER, That trust patent Indian lands shall not be subject to the provisions of the law of any district created as herein provided for but shall, upon the issuance of fee patent therefor, be accorded the same rights and privileges and be subject to the same obligations as other lands within such district or districts: PROVIDED FURTHER, That all construction, operation, and maintenance costs, except such construction costs on the Camas Division held and treated as a deferred obligation herein provided for, on this project shall be, and are hereby, made a first lien against all lands within the project, which lien upon any particular farm unit shall be released by the Secretary of the Interior after the total amount charged against such unit shall have been paid, and a recital of such lien shall be made in any instrument issued prior to such release by the said Secretary. The contracts executed by such district or districts shall

recognize and acknowledge the existence of such lien: PROVIDED FURTHER, That pending the issuance of public notice the construction assessment shall be at the same rate heretofore fixed by the Secretary of the Interior, but upon issuance of public notice the assessment rate shall be 2½ per centum per acre, payable annually, in addition to the net revenues derived from operations of the power plant as hereinbefore provided, of the total unpaid construction costs at the date of said public notice: PROVIDED FURTHER, That the public notice above referred to shall be issued by the Secretary of the Interior upon completion of the construction of the power plant.

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(Approved May 11, 1926, 44 Stat. 464.)

REPORT NO. 1189—60th Congress, 1st. Session

AMENDING AN ACT OPENING TO SETTLEMENT THE FLATHEAD INDIAN RESERVATION IN THE STATE OF MONTANA.

March 7, 1908—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed.

Mr. Hackney, from the Committee on Indian Affairs, submitted the following

REPORT

(To accompany S. 3640)

The Committee on Indian Affairs, having under consideration the bill (S. 3640) to amend sections 9 and 14, Chapter 1495, of the Statutes of the United States entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation in the State of Montana and the sale and disposal of all surplus lands after allotment," report the same back with amendments, with the recommendation that the same as amended do pass. The amendments are as follows:

On page 4, line 6, strike out the word "sixty," and insert in lieu thereof the word "forty."

On page 5, strike out all of lines 12 to 22, inclusive, and insert in lieu thereof the following:

The land irrigable under the systems herein provided which has been allotted to Indians in severalty,

shall be deemed to have a right to so much water as may be required to irrigate such lands without cost to the Indians for construction of such irrigation systems. The purchaser of any Indian allotment purchased prior to the expiration of the trust period thereon shall be exempt from any and all charge for construction of the irrigation system incurred up to the time of such purchase. All lands allotted to Indians shall bear their pro rata share of the cost of the operation and maintenance of the system under which they lie.

On page 5, line 24, before the word "land," insert the word "unallotted."

On page 6, line 5, after the word "Interior," strike out the remaining part of line 5, and also strike out all of lines 6, 7, 8, 9, 10, and 11.

On page 7, at the end of line 11, insert the following words:

Provided, That the Secretary of the Interior may withhold from any Indian a sufficient amount of his pro rata share to pay any charge assessed against land held in trust for him for operation and maintenance of the irrigation system.

The reasons for the proposed legislation may be briefly stated as follows: The Fifty-eighth Congress passed an act allotting to the Indians of the Flathead Reservation in Montana their lands in severalty, and provided for the sale of the surplus lands. Under the original act the Secretary of the Interior, as trustee, was authorized to use one-half of the proceeds from the sale of lands in the construction of irrigation systems on this reservation. Recent surveys made under the direction of the Secretary of the Interior have developed the fact that a large portion of these lands can be successfully and cheaply irrigated. Appropriations have been made by Congress for the preliminary irrigation work, and the pending Indian appropriation bill carried an additional sum for the completion of the survey and the beginning of the construction work. The moneys expended by the Government, however, are to be reimbursed out of the proceeds of the sale of the land. The provisions of this amendment give the Secretary the right to use all the proceeds of the sales until the irrigation sys-

tems have been constructed, the remaining moneys to be divided among the Indians as provided in the original act.

The provisions of the original act were found also to be insufficient to provide for the apportionment of the cost of the construction of the irrigation system to the various tracts of land and also to provide for the apportionment of the cost of operation and maintenance of the system after its completion. By the terms of this act the lands which may be allotted to the Indians will not be charged with any of the cost of the construction of the irrigation system, but their proportionate part of the cost of construction will be taken out of the general fund by the Secretary of the Interior. The lands to be sold to settlers will be charged with their proportionate cost of this irrigation system, and this will be payable in fifteen annual installments. Various other matters of detail respecting the water rights are covered by the bill.

As the bill passed the Senate and came to the House it undertook to release the Indians from the payment of their proportionate share of the cost of operation and maintenance of the irrigation system. On the hearing of the bill before this committee is was developed that in all probability three-fourths of the irrigable lands would be allotted to Indians, and it was seen that in all probability the great burden of maintenance of this extensive irrigation system might be thus thrust upon a very few of the purchasers of land, and, such being the case, no prudent purchaser would feel like investing his money in the purchasable land when the cost of maintenance would be so unevenly adjusted as to throw the entire charge upon him, and in some cases the charge might be sufficient to cover the entire value of his land. The attention of the author of the bill, together with the Indian Office, was brought to this matter by your committee, and, after careful consideration of all the facts and circumstances, the five amendments proposed by your committee and submitted herewith were agreed upon. As a result of these amendments your committee is of the opinion, and this opinion is shared in by the Reclamation Service and by the Commissioner of Indian Affairs, as well as the author of the bill in the Senate, that the irrigation system can be carefully constructed, the cost thereof equitably ad-

justed, and the cost of maintenance and operation will be evenly distributed to the various owners of irrigable lands. The Flathead Reservation, where the irrigation system will be constructed, embraces an area of very fine land especially adapted by reason of soil and climatic conditions to the growth of small fruits and grain.

Your committee beg leave to call the attention of the House to the letter from the Secretary of the Interior advocating the passage of this measure, which is printed in full in the report of the Senate Committee on Indian Affairs, being Report No. 65.

The committee therefore recommends the adoption of the five amendments and recommends that the bill pass as amended.